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Supreme Court, U.S.
FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 97-1297

In The

Supreme Court of the United States

October Term, 1997

ALLEN DeBORD AND DEBRA DeBORD, Individually and as next friends for Kelly DeBord,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, and CINDY ORMSBY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34 pp

RESPONSE TO PETITIONERS' QUESTION PRESENTED

The Question Presented by Petitioners does not accurately reflect the issue in this case. The critical issue in this case is whether, under federal law, a school district nurse must administer prescription drugs to a student in an amount exceeding the recommended and approved dosage, when the nurse sincerely believes the administration of such a dosage would violate her professional ethics and possibly subject her to malpractice and when the administration of such medicine would violate the school district's policy.

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STATEMENT OF THE CASE

Petitioner Kelly DeBord and her parents (collectively "the DeBords") filed this lawsuit against Respondents Board of Education of the Ferguson-Florissant School District, Shirley Salmon, Joyce Dreimeier, and Cindy Ormsby (collectively "Ferguson-Florissant" or "the School District") seeking to compel Ferguson-Florissant to administer an excessive dose of the drug Ritalin SR[1] to Kelly during school hours. Although Ritalin has not been approved by the United States Food and Drug Administration for use in dosages exceeding 60 milligrams ("mg") per day even for adults, the DeBords demanded that Ferguson-Florissant administer a dosage that would have resulted in Kelly receiving 140 mg of the drug per day. When the nursing staff of the School District refused to administer the drug, the DeBords filed this lawsuit.

Kelly DeBord was, at all times pertinent to this matter, a first-grade elementary school student in the Ferguson-Florissant School District. Kelly was under the care of Sheldon Kessler, M.D. In 1993, Dr. Kessler diagnosed Kelly, at age four years, with Attention Deficit Hyperactivity Disorder ("ADHD").

Dr. Kessler prescribed 140 mg of Ritalin SR per day for Kelly. The prescription provided that the 140 mg dosage be administered at designated times during the day in two separate dosages as follows. Upon rising in

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[1] Ritalin SR is a time-release medication that, according to recommended guidelines, has a "duration of action for approximately eight hours." *Physicians' Desk Reference* 1996 at p. 848.

the morning, Kelly received 100 mg of the medication at home. Prior to February 15, 1996, Kelly also received 40 mg of Ritalin SR at 3:00 p.m. at school.

On February 15, 1996, Joyce Dreimeier, a Ferguson-Florissant school nurse, informed Kelly's mother that Nurse Dreimeier could not administer the 40 mg dosage of Ritalin SR at 3:00 p.m. because the total daily dosage exceeded the recommended daily dosage of 60 mg set forth in the *Physicians' Desk Reference* ("*PDR*").[2]

It is uncontested that the District has a clear policy regarding the administration of any medication. The policy states that the nurse has the right to refuse to administer medication if, in her reasonable and prudent judgment, the request for medication exceeds the maximum dosage recommended in the PDR or other approved pharmaceutical manuals. The policy also provides that the school nurse may determine, based on her professional judgment, whether a prescribed medication should be administered at school. The policy further states that

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[2] Nurse Dreimeier refused to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. because the recommended dosage of Ritalin SR is a *total daily dosage* of 0.3 mg to 2.0 mg per kg of body weight. *Pediatric Psychopharmacology*, Vol. 15, p. 191, No. 1, March 1992; *Journal of Child and Adolescent Psychopharmacology*, Vol. 1, p. 7, No. 1, 1990. According to this formula, the maximum recommended daily dosage of Ritalin SR for a child of Kelly's weight, 40 pounds or 18 kgs, would be approximately 36 mg. Dr. Kessler is currently prescribing 140 mg per day for Kelly, almost three times the highest recommended daily dosage for even an adult and more than four times the recommended dosage for a child of Kelly's weight. Additionally, Dr. Kessler is likely to increase Kelly's dosage as she grows.

physician-prescribed medications must be "cleared with the school nurse before being taken while in school."

Ferguson-Florissant's nurses regularly and without incident administer Ritalin to approximately 442 students with the diagnosis of ADHD or Attention Deficit Disorder ("ADD") each day. However, no School District nurse knowingly administers Ritalin SR in a dosage that exceeds the recommended daily dosage as set forth in the *Physicians' Desk Reference* or in the manufacturer's package insert.

Similarly, the School District's nurses regularly administer other medicines to children with various disabilities and conditions. No School District nurse, however, knowingly administers any medication to any student that exceeds the recommended daily dose as established in the PDR or other approved pharmaceutical manuals. Indeed, on at least one prior occasion, a School District nurse refused to administer a physician-prescribed dose of arsenic to a student.

On March 13, 1996, the DeBords attended a meeting of the Board of Education of the Ferguson-Florissant School District ("Board") to challenge the nurse's decision not to administer Kelly's Ritalin. The DeBords requested that the Board review the school nurse's decision not to administer 40 mg of Ritalin SR at 3:00 p.m. to Kelly.

Ferguson-Florissant shortly thereafter informed the DeBords that the Board had decided to support the nurse's decision not to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. Nurse Dreimeier and other school

officials, however, offered the DeBords numerous reasonable accommodations. *See* footnote 9, *infra*. After the DeBords rejected all of the proposed accommodations, they filed a Complaint in the United States District Court for the Eastern District of Missouri seeking injunctive relief and monetary damages.

On April 4, 1996, the District Court heard Plaintiffs' Motion for a Temporary Restraining Order. Following the hearing, the Court denied the Motion and set a hearing on Plaintiffs' Motion for a Preliminary Injunction.

Following the preliminary injunction hearing, at which the Court heard the testimony of the parties and their designated experts, the District Court orally denied Plaintiffs' Motion for a Preliminary Injunction.

On November 26, 1996, the District Court granted Ferguson-Florissant's Motion for Summary Judgment. The DeBords subsequently appealed to the United States Court of Appeals for the Eighth Circuit. On October 9, 1997, the Eighth Circuit affirmed, in a written opinion, the decision of the District Court. The DeBords then filed their Petition with this Court.

The Court should decline to exercise its discretion to review the well-founded decisions of the courts below. In their Petition to this Court, the DeBords attempt to obfuscate the simple issues in this case of first impression. The DeBords employ diversionary tactics to draw attention from the critical focus of this matter and to avoid answering the relatively simple legal questions that lie at the heart of this uncomplicated case. Accordingly, for the reasons addressed more fully herein, Ferguson-Florissant

respectfully requests that the Court deny the DeBord's Petition.

REASONS FOR DENYING WRIT

I. THE DEBORDS REQUEST FOR CERTIORARI SHOULD BE DENIED BECAUSE THEIR QUESTION PRESENTED IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

The Question Presented for Review by the DeBords is inappropriate for this Court's consideration because it does not properly reflect either the decision of the District Court or the Eighth Circuit below. In the DeBords' Petition, the sole Question Presented for Review is as follows:

> Do speculative concerns about harm to the student and liability to school district personnel **excuse** a school district from its obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to make reasonable modifications of its policies in order to accommodate a student's disability?

Petition at ii (emphasis added).

As reflected in the DeBords' Statement of the Case, the District Court held that although Kelly's condition constituted a disability under the applicable statutes, Ferguson-Florissant's decision not to administer the excessive dose of medication prescribed was a non-discriminatory decision based on a facially neutral and uniformly applied policy. Petition at A-16. The District Court also held that Ferguson-Florissant complied with

both Section 504 and ADA by offering to make reasonable accommodations. *Id.* at A-17. The District Court did not hold, either expressly or by implication, that the school district was **excused** from its obligations under either Act.

Likewise, the Eighth Circuit held that the policy in question did not discriminate based upon Kelly's disability, Petition at A-7, and that the School District satisfied its obligations to reasonably accommodate Kelly's disability. Petition at A-8. Contrary to the DeBords' misleading Question Presented, the Eighth Circuit, like the District Court, never intimated that the School District was **excused** in any way from complying with Section 504 or the ADA.

Even a cursory review of the Statement of Issues in the DeBords' brief before the Eighth Circuit clearly demonstrates that the Question Presented for Review in this Petition was never presented for consideration to the Eighth Circuit.[3]

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[3] The Statement of Issues as set forth in the DeBords' appellate brief reads as follows:

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT THE PLAINTIFF WAS NOT DISCRIMINATED AGAINST BASED ON HER DISABILITY.

II. THE DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFF WAS OFFERED REASONABLE ACCOMODATIONS TO HER DISABILITY.

III. THE DISTRICT COURT ERRED IN RULING THAT THE SCHOOL DISTRICT'S POLICY WAS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Hence, the DeBords' Question Presented for Review is not properly before this Court.

It is undisputed that a school district has two obligations under the ADA and Section 504. First, a school district may not discriminate against a student on the basis of the student's disability. Second, a school district must offer to reasonably accommodate the disability of a student so that the student may participate fully in the programs and services of the school district, unless to do so would fundamentally alter a program. *See* 29 U.S.C. § 794(a); 34 C.F.R. § 104.33(a). At no point in the proceedings below did Ferguson-Florissant contest these two explicit statutory requirements. The courts below clearly found, in an application of the law to the undisputed facts, that Ferguson-Florissant had satisfied its statutory mandates as a matter of law.

Having lost on the grounds presented to the District Court and the Eighth Circuit, the DeBords attempt to take another bite at the apple by reframing their argument in the Question Presented to this Court. Traditional Supreme Court practice, however, precludes the grant of certiorari when the argument in support of certiorari was not raised in the courts below and, thus, not pressed or passed upon by the courts below. *United States v. Williams*, 504 U.S. 36, 43 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *DeShaney v. Winnebago County Dep't*

IV. THE DISTRICT COURT FAILED TO ADDRESS ALL OF APPELLEE'S [SIC] SECTION 1983 CLAIMS BASED ON DEPRIVATION OF RIGHTS UNDER FEDERAL STATUTES.

of Soc. Servs., 489 U.S. 189, 195 n.2 (1989); *United States v. Lovasco*, 431 U.S. 784, 788 n.7 (1977). Absent exceptional circumstances, this Court will not review an argument not raised below. *Id.*

Because the DeBords did not present to the courts below the question presented to this Court, such question could not have served as the basis for the decisions by either the District Court or the Court of Appeals. *Holly Farms Corp. v. National Labor Relations Bd.*, 116 S.Ct. 1396, 1402 n.2 (1996). A brief examination of the lower courts' decisions in this matter confirms this fact. The DeBords simply have presented an improper question to this Court for review. Thus, certiorari should be denied.

II. THE DEBORDS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Even if they had correctly stated the appropriate question for review, the DeBords have patently failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth several circumstances under which certiorari may be proper. *Id.* Not only have the DeBords failed to identify any such circumstances in support of their request for certiorari, they also have failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, the DeBords merely hint at two such circumstances in support of their Petition, and

these two circumstances are conspicuously absent in this case.

A. This Case Does Not Involve a Split of Authority Among the Circuits.

The DeBords' implication that this case involves a split of authority among the United States courts of appeals is erroneous. Under Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts in order to warrant certiorari is a **direct** conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley*, 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part

of the "quid pro quo" for the government's agreement not to charge a higher offense). The case at bar simply does not present any circuit decision in direct (or even indirect) conflict with any other circuit on the specific issue in this case.

The School District's exhaustive research has revealed no previous cases in any federal court which have addressed the specific issue in this litigation. The DeBords have also been unable to cite to any such case.

Further, only one other case could be found which has raised this same issue since the present action was filed, *see Davis v. Francis Howell School District*, No. 4:96CV789-DJS (E.D. Mo. April 22, 1997), *appeal docketed*, No. 97-2379 (8th Cir. argued Jan. 12, 1998). The *Davis* case involves the same counsel who represent the parties in the present litigation, and involves the same physician, Dr. Kessler, and the same issue. *Davis* is currently pending decision in the same circuit that decided the present case. *Id.* Because the present dispute is a case of first impression, the Eighth Circuit's ruling cannot possibly conflict with any other circuit on this matter.[4]

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[4] Indeed, the DeBords have previously admitted in a number of pleadings to the Eighth Circuit that this case is one of first impression in the circuit. In particular, the DeBords asserted in *Appellants' Motion to Reconsider Denial of Renewed Request for Oral Argument and Suggestions in Support* that "[t]he pleadings of both sets of parties, in the instant appeal and in the similar *Davis* case, have stated time and again that these cases raise complex issues of law of **first impression** in this Circuit." Likewise, the DeBords asserted in *Appellants' Renewed Request for Oral Argument and Motion to Consolidate* that "[t]he pleadings of the parties in the instant appeal and the *Davis* [sic] have

Moreover, this Court should not be inclined to grant certiorari concerning an issue that is unlikely to recur.

The DeBords' citation to several decisions from district courts[5] and circuit courts of appeals in an attempt to raise a split of authority between the circuits is similarly unavailing. None of the decisions cited by the DeBords is on point. As this Court has observed in the past when denying certiorari, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a **real embarrassing conflict of opinion and authority** between the circuit court of appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (emphasis added).

None of the circuit court cases cited by the DeBords conflicts with the decision of the Eighth Circuit on the same legal question of whether a school district nurse must administer prescription drugs in an amount exceeding the recommended and approved dosage. Certainly,

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stated that the cases raise complex and novel issues of law of **first impression** in this Circuit. Once again, the DeBords cited as support for *Appellants' Request for Additional Time to File Opening Brief* the fact that "[b]oth cases raise **multiple and complex issues** of **first impression** in this Circuit . . . " (emphasis added).

[5] A conflict between a decision of a district court and that of a court of appeals is generally not a sufficient ground to warrant the granting of certiorari. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) (only "in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice.").

the present case does not present a "real embarrassing conflict of opinion and authority" between the circuits as required by the Supreme Court. *See id.*

Even a cursory examination of the cases cited by the DeBords reflects the absence of any conflict between the circuits. *Compare Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 22-23 (1st Cir. 1991) (court concluded that university had failed to meet its duty of seeking reasonable accommodation); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 622 (9th Cir. 1982) (court analyzed risk of future injury in context of work related injuries); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1383 (10th Cir. 1981) (focus is on whether university discriminated on the basis of handicap, and mere fact that the university acted in a rational manner is not a defense). The DeBords' effort to identify a "split" among the circuits is utterly unsupported and must be flatly rejected.

B. The Decisions Below in the Present Case Do Not Conflict with Other Decisions Within the Eighth Circuit.

The DeBords' contention that the Eighth Circuit's decision in *DeBord* conflicts with other panel decisions within this same circuit must be flatly rejected. Once again, even a cursory examination of the myriad of cases cited by the DeBords illustrates that no split exists within the Eighth Circuit. As explained *supra*, the *Davis* case, presently on appeal before the Eighth Circuit, is the only other case even remotely on point in the Eighth Circuit.

Assuming *arguendo* that the *DeBord* decision actually does conflict with other Eighth Circuit precedent, which

it undoubtedly does not, such a conflict **still** would not warrant the grant of certiorari. *See* Sup. Ct. R. 10(a). Rule 10(a) contemplates a conflict between **decisions of two or more courts of appeals**, and **not** conflicting decisions of panels within a circuit. Rule 10(a); *see Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."); *United States v. Zolin*, 491 U.S. 554, 561 (1989) (full Ninth Circuit Court of Appeals vacated panel opinion and ordered en banc review, on the basis of perceived conflict between two earlier Ninth Circuit opinions and upon limited en banc review, Court concluded that intracircuit conflict was illusory).[6]

Such conflict is best resolved by the court of appeals itself, sitting en banc. *See generally Western Pacific R.R. Case*, 345 U.S. 247, 273 (1953) (Jackson, J. dissenting) ("[i]n cases of intracircuit conflict or other exceptional circumstances, which actually demand the full attention of the court, the judges of a court should be trusted to convene on their own initiative.").

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[6] *See* Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) ("Likewise, contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.").

C. The Eighth Circuit's Decision in the Present Case Does Not Conflict with the Precedent of the United States Supreme Court.

As a further example of their scatter-shot attempt to convince this Court to take review of this case, the DeBords imply that this case involves a decision by a United States court of appeals on an important federal question that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c). This argument must fail.

First, the federal question involved in this case is not "important" such that it would fit within the confines of Rule 10(c). This case of first impression surely does not constitute an "important matter" as contemplated by Rule 10. Interpreting a previous version of Rule 10, this Court held that in order to justify the granting of certiorari, a case must present an issue that reaches to a problem "beyond the academic or episodic." Sup. Ct. R. 17 (renumbered as Rule 10, Jan. 1, 1990); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1954) (interpreting Rule 17). As the Court explained in *Rice*, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* Under this reasoning, the present case is plainly insufficient for review by this Court.

A decision by the Supreme Court in this case, pursuant to the Court's standards, would be of interest only to the parties in this case, the parties in *Davis*, and those with a purely academic interest in the issue. Hence, this case obviously does not "reach beyond the academic or the episodic." Indeed, as Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no

> more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). Justice Stewart's admonition is particularly applicable to the present case. The case at bar presents no special or important reason for this Court to accept review under Rule 10(c).

Moreover, and of equal importance, this case does not conflict with relevant decisions of this Court. The DeBords cite a litany of decisions by the Supreme Court in another unfocused attempt to raise a conflict between Supreme Court precedent and the Eighth Circuit's decision below.[7]

Once again, however, the decisions cited by the DeBords are based on facts far removed from those present in the instant case. Moreover, some of the decisions cited are based on entirely different statutory schemes inapplicable to this case.

The DeBords maintain that this Court's ruling in *Alexander v. Choate*, 469 U.S. 287, 299 (1985), is one such conflict. The *Alexander* case, however, did not address

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[7] The Eighth Circuit's decision in *Debord* conforms with the pronouncement of *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 284 (1987). As discussed above, Respondents administer Ritalin to hundreds of students daily. Moreover, in the *Nassau County* case, the Court explicitly questioned whether courts should "defer to the reasonable medical judgments of private physicians" when determining whether a person is otherwise qualified for the job. *Id.* at 288 n.18.

Section 504 in the context of disabled students. Rather, that case involved a state reduction in Medicaid benefits and assumed that Section 504 was applicable to at least some of the disparate impact claims at issue in that case. *Id.* at 299.

The DeBords cite *Alexander* for the proposition that Section 504 requires the school district, not the disabled student, to reasonably modify its policies to provide meaningful access to its programs and services. *Id.* at 301 n.21. The DeBords contend that the School District failed to reasonably modify its policy to provide Kelly with meaningful access to its health services. The Eighth Circuit, however, clearly found that the School District's proposals to establish schedules to allow early release of the student or to allow a designee of the DeBords to administer the medication at school (in the prescribed dosage) satisfied the requirements of Section 504. Petition at A-8. Thus, Ferguson-Florissant cannot fathom the manner in which *Alexander* conflicts with the decisions of the courts below in the case at bar.

Moreover, the DeBords' reliance on cases brought under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, to support the contention that Respondents are obligated to administer mega-doses of Ritalin to a student is similarly misplaced. For example, a review of the DeBords' brief, without reading the cases cited therein, might lead one to conclude that the *Tatro* case involved facts identical to the present case. *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). The DeBords, however, strategically omitted the fact that Kelly DeBord has never been identified as a student with an IDEA disability who qualifies for IDEA educational services.

Further, the DeBords did not bring this instant action pursuant to that statute. Therefore, the DeBords cannot rely upon case law interpreting the IDEA, a complex statutory scheme distinct from the ADA and Section 504, in support of their cause of action.

In quoting *Tatro*, the DeBords conveniently omit the term "CIC" (i.e., clean intermittent catheterization), leading the reader to believe that the risks discussed by this Court in that case stemmed from a school nurse's administration of medication to a student. *Id.* at 893 n.12. The issue before the Court in *Tatro* concerned whether the services requested were "medical services" **under the IDEA,** which are excluded from services which a school district must provide to comply with that particular statutory scheme. Indeed, the DeBords cannot dispute that the medical services exclusion at issue in *Tatro* is unique to the IDEA. The DeBords have cited no authority establishing that the holding or reasoning in *Tatro* applies to the instant case.

Even if *Tatro* were relevant to the present case, which it certainly is not, the DeBords' cause of action does not focus on the question of whether the administration of medication at a level several times higher than that allowed by the FDA is a service that must be provided by the School District. As explained above, Respondents administer medication to hundreds of students daily. The issue here, which is unique to this case and *Davis*, is whether Respondents must administer medication at levels in excess of the maximum approved dosage when the School District nurse sincerely and honestly believes, in the exercise of her professional judgment, that such administration would violate her professional ethics and

possibly subject her to malpractice, and when the administration of such medication violates the School District's policy. Accordingly, this Court's decision in *Tatro* is inapplicable to the present facts.

The DeBords' inability to identify a true conflict in this case is further illustrated by their citation to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). That case is cited as support for the DeBords' contention that the School District may not hide behind speculative fears of harm and liability to avoid its obligation to reasonably modify its drug administration policy. *International Union*, however, is factually and legally inapposite to the present case. In *International Union*, the challenged policy barred pregnant women from working in positions involving lead exposure **exceeding** federal standards. In other words, the employer in *International Union* attempted to "raise the bar" above that mandated by federal guidelines. Unlike the OSHA guidelines in *International Union*, federal regulations in the present case do not establish "dosage" levels in a manner akin to the "lead" levels at issue in *International Union*.

In the instant case, the School District is certainly not attempting to raise the bar above that established under federal regulation or statute.[8]

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[8] Moreover, the *International Union* decision is inherently predicated upon the ability of an adult employee to place herself into a position in which she voluntarily assumes the risk. Unlike the adult in *International Union*, Ferguson-Florissant in the case at bar cannot be assured that Petitioner student has either the capacity or ability to consent to the administration of medication to her in a manner that exceeds medically recognized norms.

Federal law prohibits the Respondents from discriminating against students with disabilities, in accordance with the standards articulated above. Further, as explained more fully below, the School District has undoubtedly satisfied its obligations under federal law by offering to accommodate Kelly's disability. Unlike the employee in *International Union,* Kelly is not precluded from attending school or from receiving her desired level of medication.

In addition, the *International Union* decision does not contemplate the critical presence of a professional nurse's ethical requirements **or** state statutory mandates. The *International Union* case certainly does not excuse a professional from observing her ethical obligations and absolutely does not address the existence of statutory mandates governing the professional's conduct. The only issue in this case is whether it is a reasonable accommodation to force an independently licensed health care provider, such as a school nurse, to blindly follow a prescription of a doctor.

Finally, unlike the DeBords' request in the instant case, the *International Union* policy did not require the defendant to take affirmative steps that potentially could endanger either the plaintiff or the defendant. The *International Union* policy **proscribed** the plaintiff from performing certain jobs. This reasoning cannot be exported to the present case, wherein the DeBords seek to force a School District to **affirmatively administer** a legally controlled substance to a child in a dosage that is professionally questionable and potentially damaging. Indeed, Kelly still attended school and received her medication.

Thus, the DeBords' reliance upon *International Union* is inapposite to the instant case.

D. This Case Does Not Involve An Important Question of Federal Law that has Not Been Settled by This Court.

The DeBords' only other possible avenue to review by this Court is to demonstrate that the Eighth Circuit has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. However, as explained more fully above, this case does not present any unusually important question of federal law.

Thus, this case presents no issue involving a split of authority in the circuit courts of appeals. This case also presents no important Eighth Circuit decision which conflicts with previous decisions of this Court. Finally, this case poses no important question of federal law that should be decided by this Court. This case simply presents no issue which reaches beyond the academic or episodic. Granting certiorari in this case would be an inefficient and ineffective use of judicial resources because this Court would be reaffirming, without revisiting, well-settled law. *See Powell v. Nevada*, 511 U.S. 79, 86 (1994) (Thomas, J., dissenting). For these well-founded reasons, the Petition for Writ of Certiorari should be denied.

III. THE DEBORDS CANNOT IDENTIFY ANY ERROR IN THE APPLICATION OF FACTS OR LAW THAT WOULD JUSTIFY THE COURT'S DECISION TO ACCEPT CERTIORARI.

The DeBords' attempt to invoke this Court's review of the substantive merits of the decisions below cannot be countenanced. In their Petition, the DeBords attempt to argue the actual merit of their claims to this Court. This action is futile under Supreme Court Rule 10. Rule 10 unambiguously states that a writ of certiorari is rarely well taken "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10(c).

Although the DeBords attempt to convince this Court that a factual dispute exists as to whether the accommodations offered were reasonable, this transparent attempt must fail. The record below indisputably reflects that Ferguson-Florissant offered numerous, distinct accommodations to the DeBords in an attempt to reasonably accommodate Kelly's disability.[9]

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[9] It is undisputed that Ferguson-Florissant offered the following accommodations to the DeBord family: (1) Kelly would receive early dismissal (only twenty minutes would suffice) from school; (2) Kelly would be allowed to arrive late to school (again, by only twenty minutes); (3) Ferguson-Florissant would alter Kelly's class schedule to ensure that her non-academic classes would be scheduled at the beginning or the end of the school day, so that Kelly would not miss any academic work if her parents elected alternative arrival and departure times; (4) Kelly's parents or their designee could come to the school and administer the medication at 3:00 p.m.; (5) Ferguson-Florissant would work with Dr. Kessler to alter the timing or the amount of the dose of Ritalin; and (6) Ferguson-Florissant would pay for a second opinion from a pediatric neurologist.

It is uncontested that the DeBords rejected *all* of these offers. The DeBords have insisted throughout the course of this litigation that the *only* accommodation acceptable to them is to require the School District to administer 40 mg of Ritalin SR to Kelly at 3:00 p.m. Essentially, the DeBords' unwavering position is that their proffered accommodation is the **only** legally permissible accommodation.

However, courts uniformly have held that the disability discrimination laws do not require a school district to provide a student with the best accommodation possible or even with her (or her parents') desired accommodation. *See Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 546 (7th Cir. 1995) (citations omitted). The DeBords cannot dispute that under the ADA and Section 504, an accommodation need only be reasonable, not necessarily the accommodation of choice. *See Peterson v. Hastings Pub. Sch.*, 31 F.3d 705 (8th Cir. 1994); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996); *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996); *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217 (W.D. N.Y. 1993).

Moreover, even though the DeBords rejected each and every accommodation suggested by Ferguson-Florissant, the DeBords presented no evidence below to establish that the offered accommodations were unreasonable. Hence, the DeBords simply cannot now complain that they were not afforded reasonable accommodations. *See Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1023-24 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992) (reasonable accommodation requires only good faith effort to meet plaintiff's needs; plaintiff has corresponding duty to

make good faith effort to cooperate in offered accommodation); *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996) ("determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith."); *Hankins*, 84 F.3d at 801 (rejection of accommodation offered renders individual unqualified under ADA).

Importantly, as the District Court correctly reasoned, the School District did not "prevent Kelly from receiving the course of treatment chosen by her parents . . . [and did not prevent] Kelly from taking the prescribed dosage of Ritalin." Petition at A-21. Rather, the School District only refused to administer the medication to Kelly. . . . " Petition at A-21. Contrary to the DeBords' implication, parents do not have an absolute right to demand whatever medical treatment they desire for their children. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964).

All of the accommodations delineated above would have (and, in fact, have) permitted Kelly to receive the dosage of Ritalin at the levels prescribed by her physician. Moreover, the acceptance of any one of these accommodations by the DeBords clearly "would have satisfied the legitimate interest of both the school and the plaintiffs." Petition at A-17 (citing *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1015 (3d Cir. 1995)).

During the entirety of these proceedings, the DeBords have failed to recognize one overriding reality in this case. A nurse not only has the right, but also the

obligation, to exercise independent nursing judgment in determining whether to administer a medication.

In Missouri, a nurse is an independently licensed health care professional who may be held liable for her actions. The propriety of a nurse's conduct is governed by the Missouri Nursing Practice Act, Mo. Rev. Stat. §§ 335.011-335.096, and concomitant state regulations. A Missouri nurse may be held civilly *liable* for agreeing to administer a medication in a dosage duly prescribed by a physician. *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 622 (Mo. Ct. App. 1993). In short, the public policy of Missouri requires registered nurses to "faithfully serve the best interests of their patients." *Id.*

Hence, Ferguson-Florissant nurses have every right to protect themselves from professional malpractice by not administering medicine beyond the maximum allowable dosage. The instant case is, in large part, about whether a professional nurse in Missouri has any rights whatsoever. If the DeBords would prevail in this case, no school nurse would have the right to inform a physician that she or he refuses to poison a child. Clearly, a professional nurse has the right and obligation to decline to take action with respect to a patient in accordance with professional ethics and statutory requirements.

Although the DeBords criticize the Ferguson-Florissant nurse's judgment as "archaic, discriminatory, and medically unsound," the DeBords provide absolutely no

evidence or authority buttressing this cursory and inflamatory statement.[10]

Again, it appears that the DeBords have adopted this posture because Ferguson-Florissant refused to adopt the only accommodation that the DeBords would accept: i.e., forcing Ferguson-Florissant to violate its medication administration policy and compelling the nurse to contradict her own professional judgment and ethics, as well as her statutory responsibilities, by administering the Ritalin in the manner and at the time demanded by the DeBords.

Further, as the courts below accurately found, requiring Ferguson-Florissant to waive or substantively modify its medication policy in the manner demanded by the DeBords certainly would have, under the present circumstances, constituted an undue burden and a fundamental alteration of an important, facially neutral policy. Hence, this finding serves as yet another, independent reason for judgment in favor of Ferguson-Florissant.

Under clearly established law, an accommodation is not reasonable if it requires substantial modification of existing programs or if it would require fundamental alterations in the nature of such programs. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995); *Conner v. Branstad*, 839 F. Supp. 1346, 1355 (S.D. Iowa 1993) (citing *Alexander v. Choate*, 469 U.S. 287,

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[10] Even if the DeBords' harsh assessment of Nurse Dreimeier is correct, that does not make her conduct discriminatory. Indeed, as the courts below found, the DeBords offered no evidence to show that the School District treated nondisabled students more favorably than their daughter.

299-300 (1985)). It is difficult to imagine a more fundamental alteration of a program than stripping a nurse of her own reasonable judgment and conscience.

Even if Ferguson-Florissant had been unable to demonstrate that the DeBords' requested accommodation was unduly burdensome or a fundamental alteration of a school program, Ferguson-Florissant would still have been entitled to prevail in this lawsuit. As explained more fully above, the DeBords' rejection of numerous reasonable accommodations proposed by Ferguson-Florissant is fatal to the DeBords' claims as a matter of law. Indeed, the lower courts' finding on that issue serves as wholly independent grounds for the entry of judgment in favor of the School District. The DeBords cannot identify any error on the merits by the courts below justifying this Court's review.

CONCLUSION

For each of the reasons set forth in the School District's brief, this Court should deny the DeBords' Petition for Writ of Certiorari.

Respectfully submitted,

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